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ABSTRACT

The purpose of this paper is to examine, from a Constitutional perspective, the bases on which ability grouping and tracking might be challenged as barriers to equal educational opportunity. Findings from educational research on ability grouping, commentary from law review journals, and the texts of cases themselves are included as a part of the inquiry into the direction such legal challenges might take. Three approaches are followed in the analyses of the legal literature. First, those concepts likely to influence both the character of a legal challenge to ability grouping and the direction of the court's responses to such a challenge are identified. Second, those cases in which tracking has already been considered by the courts are examined to determine legal precedents for future court action. Third, cases which might be considered analogous--those dealing with related issues--are reviewed to identify legal approaches which might be adopted in a challenge to ability grouping and tracking. (Author)

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TRACKING AND ABILITY GROUPING IN AMERICAN SCHOOLS:

SOME CONSTITUTIONAL QUESTIONS

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ABSTRACT

TRACKING AND ABILITY GROUPING IN AMERICAN SCHOOLS: SOME CONSTITUTIONAL QUESTIONS

The study's objective was to examine tracking and ability grouping from a Constitutional perspective. Given the recent involvement of the judicial system in the provision of equal educational opportunity, the following issues were the focus of this review of the legal literature: what concepts are likely to form the basis of a Constitutional challenge to ability grouping, what are the legal precedents in this area, and what legal approaches have been taken an analogous cases. The examination of actual cases and commentary revealed several basic issues which point to the likelihood of a successful court challenge in the future.

Tracking and Ability Grouping in Schools:

Some Constitutional Questions

Citing the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, the Warren Court in 1954 struck down the "separate but equal" concept of educational equity. In doing so, the court made two rulings with far reaching consequences for the conduct of schooling in the United States. First, the separation of students by race was determined to be inherently unequal. Second, the court required that education be made available to all on equal terms. (Brown v. Board of Education of Topeka, 347 U.S. 483; 1954). The impact of these rulings, especially in view of the changing notion of what constitutes equal educational opportunity and the vigor with which the judicial system has attempted to translate these concepts into practice, has been felt in nearly all areas of public education. It is likely, too, that aspects of educational practice, not yet challenged on these grounds in the legal system, will be subject to scrutiny by the courts in the future. It is also likely that many of these challenges will involve the distribution of educational resources and opportunities to various groups of students within schools rather than focusing only on between school inequities. In view of these legal realities impinging on the conduct of education, ability grouping and tracking, which have already received some attention from the courts, will probably be subject to further legal action.[1]

The purpose of this paper is to examine, from a Constitutional perspective, the bases on which ability grouping and tracking might be challenged as barriers to equal educational opportunity. Findings from educational research on ability grouping, commentary from law review journals, and the texts of cases themselves are included as a part of this inquiry into the direction such legal challenges might take. Three approaches are followed in the analyses of the legal literature. First, those concepts likely to influence both the character of a legal challenge to ability grouping and the direction of the court's responses to such a challenge are identified. Second, those cases in which tracking has already been considered by the courts are examined to determine legal precedents for future court action. Third, cases which might be considered analogous--those dealing with related issues--are reviewed to identify legal approaches which might be adopted in a challenge to ability grouping and tracking.

Before considering the legal literature, however, it is essential to review the characteristics common to tracking and ability grouping that are likely to be the focus of legal action. The most fundamental characteristic of all systems of ability grouping is that they center on the classification and separation of students for different educational treatments. The extent and type of separation ranges from within class groupings in which the pace of instruction in similar contents is varied (reading groups, for example) for relatively short periods of time, most common in the early elementary grades, to an almost complete separation of students for the provision of distinct contents based on assumptions about students' educational and occupational potential at many secondary schools. Nevertheless, all groupings of this type, however varied, share this characteristic. Ability grouping or tracking of any type creates classifications that determine the quantity

and type of education students receive. This classification of students, from a legal view, constitutes a governmental action which affects children's access to education.

Also characteristic of ability grouping is a set of assumptions about it widely held by educators. First is the belief that students differ greatly in their academic potential and aptitude for schooling. Students are seen as so different, in fact, that distinct educational treatments are viewed as necessary to facilitate learning in different students. Further, student differences are considered so great and difficult to manage that the segregation of various types of students into separate instructional groups is required to effectively administer these different treatments. Second, although it is often acknowledged that learning deficiencies can be remediated and that students with educationally impoverished backgrounds can "catch up" through special temporary compensatory programs, in practice these results are more often considered the exception than the rule. In fact, the aptitude characteristics on which students are classified are seen as quite stable. While not everyone holds that abilities are inherent and immutable, it is generally believed that aptitude is not likely to be much altered by educational treatments. The third assumption is that the classification of students according to their learning potential can be accurately and fairly easily accomplished.

These three assumptions result in a number of characteristic ability grouping practices which influence the duration and strength of the impact of classifications on the opportunities of students. As such, these practices may be subject to judicial review.

First, following from the view that the wide differences among students requires not only their being grouped homogeneously but their being provided different educational treatments, students in various tracks and ability levels

have substantially different educational experiences.

The separation of students itself leads to marked differences in class composition. Studies of tracking and ability grouping have consistently found high correlations between race and socioeconomic status and track level. Minority children and those from the lowest socioeconomic groups have been found in disproportionate numbers in classes at the lowest track levels and children from upper socioeconomic levels have been found to be consistently over-represented in higher tracks (Mehl, 1965; Heathers, 1969; Shafer and Olexa, 1971; Heyns, 1974; Alexander and Eckland, 1975; Hauser and others, 1976; Alexander and McDill, 1976; Metz, 1978; Oakes, 1981a). These differences may lead to reduced opportunity for academic achievement. Students in low tracks are less likely to have peer models of middle-class high achievers. In view of the studies that have linked class composition with academic achievement, these differences are likely to affect differences in the education of students at different track levels (Coleman, 1966; U.S. Commission on Civil Rights, 1967; Cohen, Pettigrew, and Riley, 1972). Additionally, low track teaching assignments are less preferred by teachers and, as a result, low classes are usually taught by the least experienced teachers in the school (NEA, 1968). Both the teachers' dislike of a teaching assignment and relative inexperience are likely to affect the education of students in low groups.

Further, both the content and methods of instruction vary markedly in classes at different levels. Students in high groups are more likely than others to have access to the knowledge most valued in society, and there is evidence to show that students in low groups spend less time in learning activities and are less likely to experience instructional strategies associated with academic achievement (Keddie, 1971; Oakes, 1981a). All of these factors indicate that the educations received by students classified and placed at different levels are quite different.

If these differences served to enhance the learning of different groups of students, they could be considered fairly neutral. However, the considerable amount of existing research on the relationship between tracking and academic achievement has not demonstrated that this type of grouping, and presumably, the differential treatment that accompanies it have led to gains in student achievement for students at all ability levels. (Excellent recent reviews of this literature include the following: Heathers (1969), Findley and Bryan (1970), Esposito (1973), and Persell (1977). In addition, a number of these and other studies have shown that tracking has had negative effects on students in average and lower groups with the most adverse effects on those students at the bottom levels (see Borg, 1966; Findley and Bryan, 1970 for excellent reviews of this literature). Rosenbaum (1976), for example, studied the effects of tracking on IQ scores longitudinally and found that test scores of students in low tracks became homogenized with a lower mean score over time. In contrast, students' scores in higher tracks became increasingly differentiated with a higher mean score over time. Additionally, in a recent study of tracking and educational outcomes, Alexander, Cook and McDill (1978) found that, even with ability and ninth grade achievement controlled, track placement affected eleventh grade achievement with students in college tracks experiencing greater gains that those in non-college preparatory programs. Thus it seem possible that the educational differences resulting both from the separation of students itself and from the educational treatments students receive may be of legal concern under the concept of education available for all on equal terms established in Brown.

Second, because student aptitude, used as the basis for tracking classifications, is seen as a quite stable characteristic of students, placements based on it are only infrequently re-evaluated. As a result student classifications tend to be permanent and resultant groupings quite inflexible. Students classified as slow in primary grades and grouped accordingly are quite often those who

graduate from high school "general" or "vocational" programs. In this way the classification process has long-term effects on the learning opportunities of students.

Further these classifications and placements are more than simply long lasting. For, while ability classifications are seen as characteristics of students themselves, they are not usually viewed as neutral attributes. To be labeled "slow" and placed in a "basic" class, for example, does not merely result in an educational treatment that is different, but equally valued to one given to students labeled "bright" and placed in an honors class. If this were so, ability classifications would be analogous to the identification of blood type, for example, which has consequences for various medical treatments. This, however, is not the case. The classifications "slow," "basic," "remedial," and those of "fast," "bright," or "honors" differ greatly in prestige, both in schools and in society in general. A student classified and placed in low tracks, whatever the particular terminology employed, is identified as "dumb," a stigmatizing label with effects that are extremely difficult, if not impossible, to overcome.

Kelly (1975) found track position directly related to self-esteem with lower track students scoring lowest on self-esteem measures. Morever, Kelly and others (Shafer and Olexa, 1971; Alexander and McDill, 1976) have shown that placement in lower tracks has had a corroding effect on students' self-esteem. Heyns (1974) found that, even with ability level and status origins controlled for, track level was an important determinant of future educational plans, a finding confirmed by Alexander and McDill (1976). The more recent work of Alexander, Cook, and McDill (1978) expands these findings to establish the existence of tracking effects not only on educational aspirations but on goal-oriented behavior as well. Controlling for pre-track enrollment achievement, goals, and encouragement from others, the study found those in college tracks to be more likely than students in other programs to apply for college admission and

have an enhanced probability of acceptance. Rosenbaum's recent study of track misperceptions (1980) supports this work with the findings that low track membership has a frustrating effect on students' college plans over and above the effect of aptitude and grades.

Furthermore, while a stigmatizing low track label may negatively affect a student's self-perceptions, it is also likely to lower the expectations for his or her learning held by peers, teachers, and school counselors. These lower expectations may result in a self-fulfilling prophecy with students achieving only what is expected of them. As is well known, many of the teacher expectation studies have shown different outcomes for similar students resulting from teacher behaviors modified by their different expectations for them (See Persell (1977) for a comprehensive review of this literature). The stigmatizing effects of track labels and the concomitant harm, especially to misclassified students, are also issues which may be of interest to the courts.

Third, despite these long-lasting and potentially harmful effects of ability grouping decisions on students the classification process is rarely well-defined or consistently carried out. Many districts, in fact, have no formal policy regarding the criteria for ability grouping placements; in other districts, policy exists but is not carefully followed. Decisions are often left to individual administrators, counselors, and teachers. Parents and students are often not informed as to placement criteria, about the differences in educational treatments offered to different groups, or of the restrictions on students' access to further educational or occupational opportunities which may result from various placements. Moreover, in some districts and schools, parents are not routinely informed that their children are being classified and tracked at all (Oakes, 1981b).

Student placements are often based largely on the results of standardized tests of achievement or aptitude that may not always be appropriate for these decisions. In some schools, either the content or norm group of a test

may render it an ineffective measure for some groups of students--those with language or cultural differences, for example. In other situations, test administration is inappropriately conducted. Furthermore, test results are sometimes used to make decisions about placements in programs relatively unrelated to the content--the use of reading tests to determine placement in a variety of subjects, for example. Test scores are not the only widely used criteria for classification, however. Many decisions are based on teachers' and counselors' observations of past academic performance, student behavior in the classroom, student dress and speech styles and other subjective information (Cicourel and Kitsuse, 1963). The lack of defined policy and the cavalier use of test results and subjective judgments are characteristic of ability grouping classification processes in many school districts (Shafer and Olexa, 1971; Rosenbaum, 1976; Oakes, 1981b). And, because these classifications so often come to be seen as unchanging and virtually unchangeable characteristics of the students so classified--"slow," "average," "honors," etc.--the result is that classification processes that are often haphazard result in serious and long-term effects on the educational opportunities of students. Under such circumstances, the misclassification of students is a matter of substantial consequence.

Thus, several characteristics and effects of ability grouping and tracking may be susceptible to legal action in relationship to the provision of equal educational opportunity. In sum, these are: the separation of students resulting in disproportionate placements of poor and minority students in low groups; the reduced educational quality in low groups; the limited access low group students have to higher education or some occupations; the relative permanence of ability classifications and inflexibility of grouping systems;

the stigmatization of low track students; and the misclassification of students resulting from inappropriate or haphazard classification processes.

Turning to the question of the legality of ability grouping itself, or characteristic practices which are associated with it, two precepts from the Fourteenth Amendment of the U.S. Constitution must be considered. Both are contained in the following excerpt:

> . . . nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Constitution, Amendment XIV, Section 1)

The principles of due process and equal protection may both be applicable to a legal challenge to ability grouping. The principle of due process challenges governmental actions on procedural grounds, requiring that fair and just procedures be followed before denying an individual access to any important governmental benefit or constitutionally protected right (life, liberty, or property). Additionally, federal cases have established the right of procedural due process before an individual may be stigmatized by public officials. In the most frequently cited case, Wisconsin v. Constantineau (400 U.S. 433; 1971), the Supreme Court ruled that a due process hearing was required before an individual could be labeled "a drunkard," a label determined by the court to be stigmatizing. This case has been used as precedent for the requirement of due process safeguards in situations where a stigma was likely to result from a government affixed label.

Procedural due process applies to access to education directly following the ruling in Goss v. Lopez (419 U.S. 565; 1975) that education is a "property" right and that denial of such is subject to due process. While the Goss decision entitled a child to due process before a change of status that results in exclusion from school for any reason, it may be applicable to tracking as well,

although this has not been tested in the courts. The classification process that is an essential feature of tracking effects a change of status in the children involved and excludes them from particular types of educational experiences. This limited access affects not only the type and quantity of education a child receives but also affects his future educational and occupational opportunities. Because of these parallels, it seems likely that procedural due process requirements could be extended by the courts to include ability grouping decisions.

Due process procedural protections in education have been further developed in cases involving the labeling of handicapped children and their exclusion from regular school programs. Established due process procedures resulting from these cases include the provision of a notice and a hearing for any mentally retarded child being assigned to special classes (Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania [PARC], 344 F. Supp. 1257; 1971). Additionally the Mills case extended these safeguards to all "exceptional" children being considered for any type of school placement (Mills v. D.C. Board of Education, 348 F. Supp. 866; 1972). Fundamental to these procedures are the following safeguards: a) the appointment of an independent hearing officer, b) the presumption that the best placement is in a regular class, and c) shifting the burden of proof to the contrary from the child involved to the school. This third safeguard places the school in the position of having to show that the classification and placement in special programs of exceptional children is reasonably related to providing these children with a better educational opportunity than is available in the regular school setting.

The basic purpose of the due process requirement stemming from these cases is the prevention of harm accruing to students misclassified and misplaced in special programs. Both the stigma resulting from erroneous labeling and the reduced educational opportunity resulting from misplacement are harms which have been seen by the courts as warranting constitutional protections. A procedural due process hearing provides parents and out-of-school professionals with the opportunity to question or challenge the appropriateness of a classification for a particular child.

While classification and placement in a low ability group do not constitute total exclusion from regular school programs or confer the same stigma as label of "retarded" or "learning disabled," the difference seems to be in degree rather than in kind. Both classifications result in a stigmatizing label and reduced educational opportunity and are generally permanently affixed to a child. Therefore, it seems that not only could the basic due process rights established in Goss be extended to ability group classifications and placements but the specific procedures and safeguards established in the PARC and Mills cases as well.

Procedural due process requirements, however, do not challenge the legality of the classifications themselves, only set requirements for their fair application. For a substantive challenge to ability classifications, plaintiffs must usually look to the second cited principle of the Fourteenth Amendment, that of equal protection.

Yet, while the basis for making a substantive challenge to the practice of ability grouping itself is clearly the equal protection clause, the application of equal protection guarantees to school practices has certainly not been well defined. Questions of equality in relationship to public school practices are clouded by such issues as what standards should be applied to

assess adequacy in schools and whether equality means equal access, equal treatments, or equal outcomes for students. And, further, equal protection questions regarding education are confused by considerations of what standards of judicial review the court should apply to evaluating state actions in this area.

Generally, the equal protection clause has been interpreted to mean that any action by the government can not discriminate against persons in similar circumstances unless the differential treatment can be shown to be justifiable, in other words that it is necessary to achieve a valid governmental goal (Shannon, 1973). Two tests or standards of review have been traditionally applied, each under a particular set of circumstances, in cases challenging practices under the equal protection provision. First, the most common test is that of "minimum rationality." Using this test, the court requires only that the classifications or discriminations made among individuals in order to accord them differential treatment by government have some rational relationship to a legitimate governmental goal. When this test is applied, the court assumes that the state action is constitutional. The burden is on the plaintiff to show that a classification is arbitrary or unreasonable in relationship to government purposes. Not surprisingly, the absence of <u>any</u> reasonable relationship has been quite difficult to prove by plaintiffs. The second and much more stringent test applied to equal protection cases is a more recent one, emerging most clearly in the decisions of the Warren Court--that of strict scrutiny or strict review. Two criteria have been used to determine whether an equal protection challenge warrants the application of this stricter test. If government action is seen as infringing on a "fundamental interest" or as creating a "suspect classification" this test may be invoked. The important

difference between this test and that of "minimum rationality" is that when the strict scrutiny test is applied the burden of proof shifts to the defendant--the government agency under challenge. The government must prove that its action in classifying and discriminating among individuals not merely is rationally related to a government goal, but that it is essential to achieving a compelling purpose of government. Under this strict review procedure defendants have only rarely been able to prove that discriminatory action is essential to a compelling interest of the state. To establish the need for a strict scrutiny test, clearly the most advantageous position for a plaintiff, the plaintiff must establish that a fundamental interest has been infringed upon or that a suspect classification has been created by governmental action. These two criteria have not been clearly defined in education cases.

Whether or not education in itself or some level of education is a fundamental interest subject to Constitutional protection is a matter of some controversy. Several arguments have been put forth in the legal literature and in the language of cases for the consideration of education as a fundamental interest. Most notably in Serrano v. Priest (5 Cal. 3d 584; 1971) the court advanced that education is critical in gaining access to other basic personal rights including securing employment, participating fully in the political process, and exercising completely the rights of free speech and association. Additionally, the court concluded that education merits treatment as a fundamental interest because it is universal and compulsory, as it occupies ten years or more of a child's life and as it shapes individual character and intellect. In sum the Serrano court concluded, "We are convinced that the distinctive and priceless function of education in our society warrants, indeed, compels our treatment of it as a 'fundamental interest.'" (Serrano, at 609). However, a more recent U.S. Supreme Court decision in the

San Antonio Independent School District v. Rodriguez (411 U.S. 1; 1973) reversed the trend toward according education fundamental interest status for judicial review. The court concluded, "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." (Rodriguez, at 62).

Thus it appears that, for now at least, challenges citing violation of the equal protection clause in regard to school practices will not receive the strict scrutiny standard stemming from the consideration of education itself, a fundamental interest. However, in Rodriguez, this avenue was not completely blocked. The court conceded that education may be considered a fundamental interest if "the system fails to provide each child with the opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process" (Rodriguez at 299).

The educational cases in which the court has invoked the strict scrutiny test in equal protection challenges have been those cases in which plaintiffs have demonstrated that suspect classifications have resulted from governmental action. While the term has never been neatly defined, it can be inferred from cases that a "suspect" classification of people is one based on congenital and immutable characteristics that are inherently impossible to escape and that the group involved is a discrete and insular minority with no control over its status (Dick, 1974). Traditionally, suspect classifications have been those based on race, national ancestry, or alienage. The court utilizes strict scrutiny in cases involving suspect classifications as these groups have been viewed as requiring special protection from the court. In education cases the

racial segregation of students in schools has been the most common governmental action that has been shown to create suspect classifications. And, as a result, in segregation suits school districts have been required to prove that a compelling government interest has been served by segregative acts under the strict scrutiny standard of review. It is clear that school districts have been unable to do so.

Whether or not a plaintiff could find relief under the equal protection clause claiming low track classification and placement was a discriminatory governmental action which affected his or her access to education is unclear.

Under a "minimum rationality" standard of review it seems highly unlikely that the challenge would be successful. The court would assume the constitutionality of the ability grouping system and the defendant school district would simply have to show a rational relationship between grouping and educative purposes. This relationship has been fairly well established in case law during the last century. In 1877 an Illinois court decided: "Under the power to prescribe necessary rules and regulations for the management and government of the school, [the board] may, undoubtedly, require classification of the pupils with respect to proficiency or digress of advancement in the same branches." (Trustees of Schools v. People ex rel. Van Allen, 87 Ill. 303; 1877). In fact, there has been no case in which academic ability alone has been held as an unconstitutional criterion for classifying students for educational purposes. Ability grouping has been seen as one of the techniques within the purview of educators; an aspect of school-people's special expertise. As such, the courts have been unwilling to challenge academic classification.

If, however, the plaintiffs could establish that low track classification denied access to the level of education necessary to acquire the "basic minimal

skills" recognized in Rodriguez as a fundamental interest, the strict scrutiny standard of review might be applied by the courts in these cases. In that event, the defendant school district would then bear the burden of proof and be required to show that such classifications were not merely rationally related to a governmental purpose--education--but were essential to achieving a compelling state interest. It is unlikely, given the lack of evidence that ability grouping and tracking enhance either achievement or affective educational outcomes and, in fact, is likely to be detrimental to students in the lower groups, that the school district could show how a compelling government interest was being served. However, the extent of harm implied by a denial of access to education for the provision of basic minimal skills would be difficult to establish. It seems likely that such a challenge would need to assert that functional illiteracy resulted from low track placement. This would probably require proof that similar children in other classifications did acquire these basic minimal skills or evidence that the same students in other situations (subsequent tutoring, for example) had their academic deficiencies remediated. While there are no precedents for a case such as this, some parallels may be seen in the educational malpractice suit of Peter Doe v. San Francisco Unified School District (60 Cal. 3d 319; 1976).

The only successful court challenges to ability grouping and tracking thus far have been in cases where these practices have resulted in racially identifiable groups. In these cases the classification process was seen as creating suspect classifications and cases then were subject to a strict scutiny standard of review.

Hobson v. Hansen (269 F. Supp. 401; 1967) is the best known and probably still the most important ruling on tracking. The Hobson decision was based both

on the disproportionate classification and placement of both poor and minority children in low track classes. In the Hobson case, Judge Skelly Wright found the track system of the Washington, D.C. schools to be constitutionally invalid in that it violated the equal protection clause of the Fourteenth Amendment. Because the system was found to restrict access to what the court called a "critical personal right" and created suspect classifications of poor and minority children, the school district was required to prove that the track system was providing maximum educational opportunity for children of widely ranging ability levels--i.e., serving a compelling governmental interest. The court ruled that: "The track system amounts to an unlawful discrimination against those students whose educational opportunities are being limited on the erroneous assumption that they are capable of no more" (Hobson at 514). And that: "Even in concept the track system is undemocratic and discriminatory. Its creator [Spt. Hansen] admits it is designed to prepare some children for white-collar, and other children for blue-collar, jobs . . . Moreover, any system of ability grouping which, through failure to include and implement the concept of compensatory education for the disadvantaged child or otherwise, fails in fact to bring the majority of children into the mainstream of public education denies the children excluded equal educational opportunity and thus encounters the constitutional bar" (Hobson at 515).

The Hobson decision was based on the following facts: a) the inappropriateness of the aptitude tests used to assign Black and disadvantaged children to groups, based as they were on a white, middle-class norm group, b) the reduced curricula and the absence of adequate remedial and compensatory education in the lower track, c) the rigidity of the track system which made movement out

of the bottom track almost impossible, and d) the stigma placed on a child assigned to the lowest track. The Hobson decision, however, was limited to the Washington, D.C. school track system, and the judge declined to contradict the assumption that ability grouping in general can be related to the purposes of public education. Further, the decision in the appeals case of Hobson, Smuck v. Hobson (408 F. 2d 175; 1969) narrowed the original order to abolish the D.C. tracking system. Instead of abolishing the system entirely, the Smuck ruling abolished only the system as it existed at the time of Hobson. Thus the district was permitted to reinstate a system of ability grouping as long as the misuses cited in Hobson were avoided.

Since the Hobson case other litigation has dealt with ability classifications and grouping of students. The cases most directly linked to ability grouping in general are those in which tracking was implicated in the resegregation of students on the basis of race soon after schools were ordered to desegregate. In Moses v. Washington Parrish School Board (456 F. 2d 1285; 1971), one of several similar cases in the Fifth Circuit Court, the district court held that tracking violated the Black students' Fourteenth Amendment rights for the following reason:

> "Homogeneous grouping is educationally detrimental to students assigned to the lower sections and blacks comprise a disproportionate number of the students in the lower sections. This is especially true where, as [here], black students who until recently were educated in admittedly inferior schools are now competing with white students educated in superior schools for positions in the top sections" (Moses at 1342).

In a more recent case in the Fifth Circuit, McNeal v. Tate County School District (508 F. 2d 1017; 1975), the appeals court ruled that a desegregated school district could not employ an ability grouping system that resulted in

racially identifiable classrooms until it had operated a unitary system for a time sufficient to insure that the harmful effects of prior segregation had been overcome. The court summarized earlier findings of related cases in the following portion of its ruling:

> Ability grouping, like any other non-racial method of student assignment, is not constitutionally forbidden. Certainly educators are in a better position than courts to appreciate the educational advantages or disadvantages of such a system in a particular school or district. School districts, ought to be, and are, free to use such grouping whenever it does not have a racially discriminatory effect. If it does cause segregation, whether in classrooms or in schools, ability grouping may nevertheless be permitted in an otherwise unitary system if the school district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities (McNeal, at 1020).

Thus, it is clear, that ability grouping challenges have only been successful where racially identifiable classes have resulted and in school districts with a history of prior de jure racial segregation. In these cases, it is clear that, with the exception of Hobson, the focus of the court has been on the issue with legal precedent--racial separation--and not on the more educational ones, those dealing with the questions of equity in educational access, treatments and outcomes for all students.

Two other cases not directly related to the classification and placement of normal children in ability groups are also relevant here. Both concern the disproportionate placement of minority children and set new requirements on districts' classification procedures. In Larry P. v. Riles (343 F. Supp. 1306; 1972) and Larry P. v. Riles (Case No. C-71-2270 RFP; 1979), also known as Larry P. II, the court ruled that Black students could no longer be placed in classes for the educable mentally retarded on the basis of IQ tests that

resulted in racial imbalance in these classes. The ruling stemmed from the defendant school district's (San Francisco) failure to show a rational relationship between the use of IQ tests and a student's academic potential. This injunction against the use of standardized IQ tests with Black children was extended to the entire state of California in the 1979 decision. Similar findings resulted from the Lora v. Board of Education of the City of New York (456 F. Supp. 1211; 1978) case in which Black and Hispanic students claimed their rights were being violated by being placed in disproportionate percentages in special schools for emotionally disturbed children. The court found the placement procedure which included testing and subjective criteria to be a violation of students' rights to equal protection and due process. These two cases are significant for two reasons. First, they both concerned racial imbalance within types of school programs in school districts without a history of maintaining dual school systems. Furthermore the rulings in these cases did not assess the harm to be a result of prior segregation, but rather from the procedures now in use. And second, both cases were precedent setting in procedure as they focused directly on the educational processes involved as well as the segregative aspects of the classification systems in question.

These two important departures from previous cases have implications for future education cases in general and quite possibly for tracking cases as well. School districts employing grouping systems which result in racially identifiable classes, whether or not they use procedures that are ostensibly racially neutral and whether or not they have a history of segregation actions, are likely to be challenged under the principles established in these cases. And, as the research has made clear, in most multi-racial schools and districts studied, ability

grouping does result in the placement of disproportionate numbers of minority students in low tracks. It is possible then that districts, or even states (following from the Larry P. decision), may be prohibited from classifying students in any way that results in racial imbalance among school programs.

These two cases also open the door for a careful court scrutiny of educational effects of different programs. In Larry P. it was found that classification and placement in special programs for the retarded results in life-long effects on the education and future opportunities of students. In Lora, after examining the programs in which minority students were placed in regard to their class size, extracurricular activities, special programs, and support systems among other aspects, the court ruled that these placements constituted a denial of equal educational opportunity. While the courts in these cases scrutinized program processes and effects in conjunction with their segregative effects, the rulings certainly lead the way to examination of educational processes in programs as barriers to educational equity. This of course has implications for the legality of the differentiated educational experiences in all ability grouping systems.

No cases involving tracking (other than Hobson) have claimed that "suspect" classifications other than racial ones have been created by ability grouping. However, it is possible that future cases may elaborate on Hobson's use of the poor as a suspect class, without the confounding issue of race. Since it has been clearly established that poor children are disproportionately placed in low tracks, this might be the basis of a claim of equal protection violation in future cases.

Another possibility is that intelligence classifications themselves might be viewed as suspect. Certain aspects of these classifications are similar to

characteristics of those now considered suspect. Intelligence is considered immutable and beyond an individual's control. Additionally, negative stigma is attached to those labeled of low intelligence and some forms of discrimination result (Dick, 1974). While no court has yet considered intelligence classifications themselves as suspect and therefore requiring the special judicial protection resulting from a strict scrutiny standard applied to claims of equal protection violations made on discrimination according to intelligence, such an argument is possible in relationship to tracking. And, if such a claim were made in conjunction with the assertion that these classifications were used to restrict access to education as a fundamental interest--access to basic minimal skills, perhaps--chances for a successful case would be greatly enhanced. It is clear, however, that for a tracking case to successfully plead a denial of equal protection without the existence of racially identifiable groups, the courts would have to make a considerable shift in their current posture toward ability grouping and intelligence classifications.

No court has yet ruled that the practice of ability grouping in itself constitutes a violation of equal educational opportunity. Nor have the processes involved in classification and placement been seen as requiring procedural due process protections. Yet, it is clear from the research on tracking and ability grouping that the practice constitutes a governmental action which restricts students' immediate access to certain types of education, and to both educational and occupational opportunities in the future. Further, a stigma results from placement in low groups that is likely to have negative long-term consequences, including lowered self-esteem and aspirations of students and lowered teacher expectations for them that can result in a "self-fulfilling prophecy." And despite these potential harms, placement procedures often include inappropriate

measures and ill-defined subjective criteria. All of the above have been found to be constitutional violations in other contexts (with racial minorities and handicapped students). Then why not in cases involving children not determined to be a class deserving special protection of the court?

The answer is less likely that the characteristics of ability grouping and tracking could stand the constitutional test than it is that the courts are extemely reluctant to become involved in the details of school operation. In his parting words in the Hanson decision, Judge Wright commented: "It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise" (Hobson, at 517). This reluctance, however, is based on more than only a wish not to infringe on educators' areas of special competence. Likely too, is the court's awareness of how difficult it would be to frame a remedy to harms ensuing from day-to-day schooling practices. And beyond the development of a suitable remedy, the degree of court intervention in the administration of schools required to insure that such remedies are carried out is undoubtedly abhorrent to most justices--witness the complications in the Boston and Los Angeles school desegregation cases, for example.

These difficulties are real and the court's reluctance to face them directly is understandable. Yet neither can the fundamental issues be ignored--are students' rights to equal protection of the laws and due process being violated by the processes and effects of ability grouping and tracking? It seems imperative that the issue be confronted in the spirit of the mandate in Brown:

> Where a state has undertaken to provide a benefit to the people, such as public education, the benefits must be provided on equal terms to all the people unless the state can demonstrate a compelling reason for doing otherwise (Brown, at 495).

Notes

1 Throughout this paper the terms tracking and ability grouping are used interchangably. Essentially they both refer to systems whereby students are separated into relatively homogeneous achievement or ability groups for the purposes of instruction.

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